RECORD AND BRIEFS

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No. 16-369

In The
Supreme Court of the United States

COUNTY OF LOS ANGELES, DEPUTY CHRISTOPHER CONLEY, AND DEPUTY JENNIFER PEDERSON,

Petitioners,

v.

ANGEL MENDEZ AND JENNIFER LYNN GARCIA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE*, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE POLICY COUNCIL ON LAW ENFORCEMENT AND THE MENTALLY ILL, IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Founded in 1909, the National Association for the Advancement of Colored People (NAACP) is the country's largest and oldest civil rights organization. The mission of the NAACP is to ensure the equality of political, social, and economic rights of all persons, and to eliminate racial hatred and racial discrimination. Throughout its history, the NAACP has used the legal process to champion equality and justice for all persons.

Since its inception, the NAACP has advocated for fair criminal justice laws and procedures to protect communities of color and other vulnerable communities. In 2014, the NAACP published a report entitled *Born Suspect*, which provides important research and information regarding how the criminal justice system in our nation disproportionately harms African Americans and other communities of color. The NAACP advocates for fairness in policing procedures, for police accountability for wrongful conduct, and for just compensation for the victims of police misconduct.

Amicus Policy Council on Law Enforcement and Mental Illness is an association of individuals and organizations who share a common interest in improving the interface between law enforcement and the mentally ill. Amicus members are all

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[1] The parties have consented to the filing of *amicus curiae* briefs in support of either party in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

persons or organizations representing people that either suffer with, have family members who suffer with, or are dedicated to improving life circumstances for those with mental illness. In this context, mental illness refers to organic disorders that manifest themselves in some non-volitional behavioral symptoms.

As individuals, many Council members live under the weight of public indifference, prejudice and stigma. As a group, however, they actively engage in law enforcement policymaking by advocating before appropriate public bodies to advance tactics and techniques for dealing with people with mental illness. The platform by which the Council obtains standing before such public bodies has been, in large part, the requirement that governmental entities ensure their policies make reasonable accommodations to persons with disabilities under the Americans with Disabilities Act. The Council therefore advocates for the implementation of policies which result in reasonable accommodations for people with mental illness. In addition, the Council seeks to advance legal principles that affirm police accountability and promote responsible police conduct. Any decision which undermines or limits law enforcement accountability will undermine the Council's effectiveness on behalf of its constituents.

SUMMARY OF ARGUMENT

This Court's excessive force cases have consistently accounted for *all* of the relevant facts and circumstances and have not held that certain

salient facts should be ignored for purposes of Fourth Amendment analysis. The approach advocated by Petitioners, by which excessive force claims would be judged solely by looking at the circumstances at the *moment* force was used, would signify a retreat from this Court's Fourth Amendment precedents, incentivize police to disregard the Fourth Amendment, and endanger public safety.

The outcome reached below by the district court and affirmed by the Court of Appeals is consistent with the dictates of *Graham* and *Garner*. Moreover, the combination of the officers' wrongdoing and the victims' absence of wrongdoing make this case a poor vehicle for announcing a rule that functions to shrink the scope of officer liability. Under Petitioners' approach, entirely innocent victims who did not know they were dealing with police officers and who sustained permanently disabling injuries from the officers' use of deadly force, would be without a remedy. Such a result is at odds with this Court's precedents. When officers cause people to be subjected to deadly force in circumstances that are objectively unreasonable and of the officers' own making, the Fourth Amendment holds them accountable.

This Court has observed that the failure of police to announce their presence before forcing entry into a home can endanger the lives of occupants and officers alike. The Court has also acknowledged the importance of deterring such entries and recognized the role that civil liability plays to this end. However, this deterrent effect

would be greatly diminished if the Court should hold, as Petitioners urge, that culpable conduct on the part of police officers is "not relevant" for purposes of assessing the reasonableness of a particular use of force. Such an approach would be at odds with *Graham* and *Garner*, which held that the salient "question is 'whether the totality of the circumstances justifie[s] a particular sort of . . . seizure."

This Court has also repeatedly recognized the important role its decisions play in incentivizing law enforcement to conduct themselves in accord with the Fourth Amendment. A verdict for the unlawful entry alone will not vindicate the Mendezes' Fourth Amendment rights or incentivize police officers in the future to respect the "firm," "bright" line this Court has drawn at the entrance to a house.

People of color will be among those to most acutely feel the effect of any decision that retreats from the Court's traditional totality of circumstances analysis, particularly in the context of facts like these. Social science research indicates that implicit bias poses its greatest danger when officers are faced with making split-second judgments about the use of deadly force in circumstances that are tense, uncertain, and rapidly-evolving, and that people of color are more likely to be perceived as deadly threats in such situations. It is thus critical for the safety of people of color in this country that this Court acknowledge and account for the emerging literature on implicit bias when crafting rules effecting the lawful use of force.

It is likewise important to the safety of people with mental illness that the constitutional framework for excessive force claims not retreat from a totality of the circumstances approach. If a court is focused solely on the *moment* force is used, with no regard for the preceding circumstances, then force used against such individuals will almost never be deemed unreasonable.

People suffering from mental illness will be acutely vulnerable to the impact of any decision that extends the principle of immunity for the proximate consequences of unannounced, forcible entries into a home. They are more likely to have difficulty comprehending an unannounced entry, and many are likely to react in ways that will prompt officers to feel the need to employ deadly force. Officers often reasonably misinterpret the behavior, demeanor, and intentions of people with mental illness or disability, and an officer's show of force to a mentally disturbed individual will not always have the intended effect. These factors help account for the fact that a significant number of those killed by police officers in the United States die while in the midst of a mental health crisis.

ARGUMENT

I. *GRAHAM* AND *GARNER*'S 'TOTALITY OF THE CIRCUMSTANCES' INQUIRY IS MORE EQUITABLE TO PERSONS SUBJECTED TO POLICE FORCE THAN THE APPROACH PROPOSED BY PETITIONERS, AND IT INCENTIVIZES OFFICERS TO ACT IN ACCORDANCE WITH THE FOURTH AMENDMENT IN A WAY THAT PETITIONERS' APPROACH WOULD NOT.

As organizations that advocate for the interests of groups historically subjected to disproportionate levels of police force, amici know firsthand the critical role that civil liability plays in deterring dangerous police practices. For reasons explored below, see *infra* Parts II–III, amici are deeply concerned that the approach advocated by Petitioners, by which excessive force claims would be judged by looking only to the circumstances in the *moment* force was used, leaves people of color and people with mental illness particularly vulnerable.

This Court's excessive force cases have consistently accounted for *all* of the relevant facts and circumstances and have not held that any should be ignored for purposes of Fourth Amendment analysis. *See Graham v. Connor*, 490 U.S. 386, 396 (1989); *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985). Under the "totality of the circumstances" approach the Court has followed, factors that militate against the use of force matter. For example, there is a difference between an individual who both clearly intends and has the

means to do harm to an officer, and an individual who is known to be mentally ill and perhaps has the means but no such intent. That difference often may not be determinative as to the objective reasonableness of an officer's use of force, but it matters.

Amici submit that the outcome reached by the district court and affirmed by the Court of Appeals is consistent with the dictates of *Graham* and *Garner*, and that the combination of the officers' obvious wrongdoing and the victims' absence of wrongdoing make this case a poor vehicle for announcing a rule shrinking the scope of officer liability. Indeed, it would send a disturbing message if this Court were to hold that innocent people, shot in their own home by police officers who had no right to be there, are without meaningful recourse for the life-threatening injuries they suffer. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."). Amici urge this Court to reject any rule that leads to such inequitable and bizarre results.

. . .

Angel Mendez and his wife, Jennifer, were minding their own business, laying on a futon inside their home, in legal possession of a BB gun that happened to be "inadvertently" pointed at their front door. Two officers, who knew the Mendezes lived in the home, chose not to announce themselves, unlawfully entered, instantly perceived the

Mendezes as a threat, and fired fifteen rounds at them without a warning or an opportunity to surrender. Five shots struck Mr. Mendez, in the back, hip, arm, shin, and foot. *See* Pet. App. 70a. As a result, his right leg had to be amputated below the knee. *Id.* Two shots struck Jennifer Garcia (now Mendez), who was seven months pregnant, one of them in the back. *Id.* The shots were fired in rapid succession, and at no point did the officers pause to reassess the need for continuing the use of deadly force. The Ninth Circuit observed that it was "quite debatable" whether "the officers were . . . plainly incompetent[.]" *Mendez v. Cnty. of Los Angeles*, 815 F.3d 1178, 1188 (9th Cir. 2016).

The district court found that the officers failed to announce their presence, unlawfully opened the door to the home, and "almost immediately" fired fifteen shots. *Mendez v. Cnty. of Los Angeles*, No. CV 11-04771-MWF (PJWx), 2013 U.S. Dist. LEXIS 115099, at *11–16 (C.D. Cal. Aug. 13, 2013). The court concluded their actions amounted to "unreasonable, excessive force." *Id.* at *89. The Court of Appeals later affirmed that the deputies were "liable for the shooting as a foreseeable consequence of their unconstitutional entry," *Mendez*, 815 F.3d at 1195, even if "at the moment of [the] shooting" their decision to shoot was "reasonable." *See Mendez*, 2013 U.S. Dist. LEXIS 115099, at *65.

Petitioners and various amici police agencies now seize on the lower courts' conclusion that the split-second decision to shoot was not unreasonable, as a means of asking this Court to limit damages

solely to the warrantless entry, and to establish a larger precedent that would shield officers from liability for foreseeable injuries resulting from unannounced home entries that violate the Fourth Amendment. *See id.* at *87 ("In this case, it was foreseeable that opening the door . . . without knocking-and-announcing could lead to a violent confrontation."). Under the approach advocated by Petitioners, entirely innocent victims who did not know they were dealing with police officers and who sustain permanently disabling injuries from the officers' use of deadly force, would be without a remedy.

The foreseeability of the Petitioners' entry provoking a face-to-face confrontation in which the officers would feel the need to use deadly force is simply one of the "facts and circumstances" to be considered as part of the Fourth Amendment's "totality of the circumstances" reasonableness inquiry.[2] *See Graham v. Connor*, 490 U.S. 386, 396

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[2] Amici submit the following "facts and circumstances" are also relevant for purposes of assessing the reasonableness of their use of force: The officers made an unannounced, warrantless entry into the Mendezes' home. *See Wilson v. Arkansas*, 514 U.S. 927, 936 (1995) (stating "a search or seizure of a dwelling might be constitutionally defective if police officers enter without a prior announcement"). The officers knew the Mendezes lived inside the home, but they gave them no opportunity to surrender or avoid being shot. *Cf. Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985) ("[I]f the suspect threatens the officer with a weapon . . . deadly force may be used if necessary to prevent escape, and if, *where feasible, some warning has been given*." (emphasis added)). The Mendezes committed no crime. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) (stating that the "'test of reasonableness under the Fourth Amendment' . . . requires careful attention to . . .

(1989) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985)); *see also Scott v. Harris*, 550 U.S. 372, 383 (2007) ("Although [the] attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of 'reasonableness.'"); *id.* at 386 (Ginsburg, J., concurring) ("Among relevant considerations: Was there a safer way, given the time, place, and circumstances, to stop the fleeing vehicle?"). Here, the officers' use of force cannot be divorced from their contemporaneous, unannounced entry into the home. The provocation rule employed below is simply a mechanism for evaluating the constitutionality of police actions that foreseeably create a need for the use of force. What is important is that the officers caused the Mendezes to be subjected to deadly force in circumstances that were objectively unreasonable and of the officers' own making. The Fourth Amendment holds them accountable for that.

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severity of the crime at issue" (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). The officers fired fifteen rounds into a small, enclosed space, while the Mendezes fired none. *See, e.g.*, *Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir. 1993) (holding that even "when an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot any time thereafter with impunity"). In their totality, these facts reasonably account for the trial court's holding that the officers used "unreasonable, excessive force," see *Mendez v. Cnty. of Los Angeles*, No. CV 11-04771-MWF (PJWx), 2013 U.S. Dist. LEXIS 115099, at *89 (C.D. Cal. Aug. 13, 2013), irrespective of the lower courts' provocation analysis.

A. *Graham* and *Garner*'s focus on the 'totality of the circumstances' permits courts to account for officers' actions giving rise to a use of force and is more equitable to persons subjected to force than the narrow reading advocated by Petitioners.

Graham and *Garner*'s focus on the *totality* of the circumstances permits courts to account for both the absence of wrongdoing on the part of persons subjected to force, as well as the actions of police officers that unnecessarily create the need for force. This is of significant consequence to people of color and people with mental illness, who, for reasons discussed *infra*, Parts II and III, have historically been disproportionately impacted by police use of force. Petitioners assert that Mr. Mendez's possession of the BB gun is essentially the *only* thing that matters and that the officers' conduct just prior to the moment they opened fire is flatly "not relevant." Pet. Br. at 16, 23–24. *But see Perez v. Suszczynski*, 809 F.3d 1213, 1220 (11th Cir. 2016) (stating "the mere presence of a gun or other weapon is not enough to warrant the exercise of deadly force"); *accord Weinmann v. McClone*, 787 F.3d 444, 449 (7th Cir. 2015); *Bennett v. Murphy*, 274 F.3d 133, 135 n.2 & 136 (3d Cir. 2001). However, given the totality of the circumstances, it would be deeply inequitable if Mr. Mendez's lawful possession of a BB gun in the privacy of his own home, particularly when he was never given an opportunity to disarm, was deemed sufficient to break the chain of causation for an excessive force claim and effectively

shield the officers from liability for the shooting. *Cf. Scott v. Harris*, 550 U.S. 372, 385–86 (2007) (stating that "Constitution assuredly does not impose [an] invitation to impunity-earned-by-recklessness"). Taken to its logical conclusion, if Petitioners are right, and the "only" issue that matters is "what happened at the moment of the shooting," see Pet. Br. at 23–24, then police could never be liable for excessive force for shooting a person in their own home if the person possessed a gun, no matter how unreasonable the officer's conduct might have been. *But see District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008) (affirming right to possess handguns in "the home, where the need for defense of self, family, and property is most acute"). This narrow reading of this Court's precedents offers no meaningful path of relief to persons like the Mendezes, who suffered life-altering injuries through no fault of their own.

In *Scott*, another case concerning police use of deadly force, the Court said that it was "loath to lay down a rule" that would privilege those who act "recklessly . . . [and] put other people's lives in danger." *Id.* at 385. In assessing the officer's use of deadly force, the Court thought it "appropriate . . . to take into account not only the . . . lives at risk, but also their *relative culpability*," and concluded that the equities weighed against the party "who intentionally placed himself . . . in danger by unlawfully engaging in [a] reckless [action] . . . that ultimately produced the choice" for the officer to use deadly force. *Id.* at 384 (emphasis added). The Court was referring at the time to criminal suspects who act recklessly and are killed by police officers.

However, the same should certainly be true of police officers themselves. *Cf. Heffernan v. City of Patterson*, __ U.S. __, 136 S. Ct. 1412, 1418 (2016) ("[I]n the law, what is sauce for the goose is normally sauce for the gander."). It would be inequitable to consider the "relative culpability" of someone subjected to deadly force by police, but to ignore police officers' own culpability when they create the need for deadly force, particularly in cases where the victims had engaged in no wrongdoing. When officers illegally enter someone's home, do not announce themselves as police, afford the residents no chance to surrender, and then employ deadly force against them, to the point of firing fifteen shots when there is no return fire, they are acting recklessly, and they should be held accountable.

B. *GRAHAM* AND *GARNER*'S 'TOTALITY' ANALYSIS INCENTIVIZES OFFICERS TO ACT IN ACCORDANCE WITH THE FOURTH AMENDMENT IN A WAY THAT PETITIONERS' APPROACH WOULD NOT.

In *Hudson v. Michigan*, the Court observed that the failure of police to announce their presence before forcing entry into a home can endanger the lives of occupants and officers alike. *See* 547 U.S. 586, 593–94, 596 (2006) (observing that the announcement rule is rooted in the protection of human life). The Court specifically acknowledged the importance of deterring such entries, but stated, "[a]s far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts." 547 U.S. at 598.

Indeed, the prospect of civil liability is perhaps the most significant available deterrent against the practice. It is one of the reasons this case has significant public safety implications, particularly for people of color and persons with mental illness, who are more likely to be perceived as dangerous and be subjected to deadly force when officers are faced with making split-second decisions. *See infra* Parts II & III. "It is almost axiomatic that the threat of damages has a deterrent effect[.]" *Carlson v. Green*, 446 U.S. 14, 21 (1980). If the Court were to hold that officers are not liable for the foreseeable consequences of unannounced home entries that violate the Fourth Amendment, these entries are likely to occur with greater frequency. *See generally* Myriam E. Giles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001) (discussing deterrent effect of constitutional tort damages on behavior of governmental actors); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1787–88 (1991) (discussing the "systemic function" damages play in Fourth Amendment cases by "exert[ing] significant pressure on government and its officials to respect constitutional bounds").

Following the Court's determination in *Hudson* that an officer's failure to knock-and-announce does not trigger the exclusionary rule, see *Hudson*, 547 U.S. at 599–600, numerous Courts of Appeal applied the principle in cases where an unannounced entry into a home was accompanied by excessive force. *See United States v. Garcia-*

Hernandez, 659 F.3d 109, 113–14 (1st Cir. 2011) (stating "*Hudson* is categorical and that the amount of force used in effecting a no-knock entry does not alter that reality." (citing *United States v. Ankeny*, 502 F.3d 829, 833, 835–38 (9th Cir. 2007); *United States v. Watson*, 558 F.3d 702, 704–05 (7th Cir. 2009)). This development has only reinforced the need for meaningful deterrents against such entries.

In addition to civil liability, *Hudson* suggested that "the increasing professionalism of police forces" could help "deter[] civil-rights violations" with respect to the failure of officers to announce their presence. *Hudson v. Michigan*, 547 U.S. 586, 598 (2006). However, as this Court has recognized, police officers sometimes see strategic value in making entry into a home unannounced. *See Wilson v. Arkansas*, 514 U.S. 927, 934–36 (1995) (discussing multiple "countervailing" law enforcement considerations). Police professionalism does not appear to have made these entries occur with less frequency. If anything, there have been more than ever. *See generally*, American Civil Liberties Union, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING (2014) (documenting the rise of SWAT-like tactics in American policing). Drug cases, in particular, tend to afford officers vast discretion in making entry into a person's home, and they have increasingly used that discretion to make sudden, violent entries, often utilizing paramilitary tactics. *Id.* at 24.

The deterrent effect of civil liability will be greatly diminished if the Court should hold that culpable conduct on the part of police officers is, as

Petitioner's urge, "not relevant" for purposes of assessing the reasonableness of a use of force following an unannounced entry. Pet. Br. at 16, 23–24. Such a holding would also mark a significant retreat from *Graham* and *Garner*, which held that the salient "question is 'whether the *totality* of the circumstances *justifie*[*s*] a particular sort of . . . seizure." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citing *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985)) (emphasis added). If officers were to understand that certain "facts and circumstances," to include their own culpable conduct, are no longer relevant for purposes of assessing the reasonableness of force, they will feel significantly less incentive in the context of home entries to get a warrant, announce their presence, or otherwise comport themselves with the Fourth Amendment. Such a development would endanger public safety.

This Court has repeatedly recognized the important role its decisions play in "incentiv[izing] . . . the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment." *Illinois v. Gates*, 462 U.S. 213, 261 n.15 (1983) (citing *Dunaway v. New York*, 442 U.S. 200, 221 (1979) (Stevens, J., concurring)). The Court has remained cognizant of the real world consequences of its doctrines, and has been careful not to create "incentive[s] to . . . violate the . . . Fourth Amendment[.]" *Brendlin v. California*, 551 U.S. 249, 263 (2007). In criminal law, the Court has affirmed the exclusionary rule "to deter—to compel respect for the constitutional guaranty [of the Fourth Amendment] . . . by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206,

217 (1960). The Court has said the operation of such "incentive[s] to avoid Fourth Amendment violations . . . [prevents] the constitutional guarantee against unlawful searches . . . [from] be[ing] reduced to 'a form of words.'" *Oregon v. Elstad*, 470 U.S. 298, 337 n.15 (1985) (quoting *Brown v. Illinois*, 422 U.S. 590, 602–03 (1975)). The Court has also acknowledged a public interest in deterring reckless police conduct that violates the Fourth Amendment. *See, e.g.*, *Davis v. United States*, 564 U.S. 229, 238 (2011) ("When the police exhibit . . . reckless . . . disregard for Fourth Amendment rights, the deterrent value of exclusion is strong[.]") (quoting *Herring v. United States*, 555 U.S. 135, 143–44 (2009)).

The officers' conduct here was reckless as a matter of law. *Mendez v. Cnty. of Los Angeles*, No. CV 11-04771-MWF (PJWx), 2013 U.S. Dist. LEXIS 115099, at *97 (C.D. Cal. Aug. 13, 2013). It was entirely foreseeable that the Petitioners' "unannounced entry [might] provoke violence." *Hudson v. Michigan*, 547 U.S. 586, 594 (2006). A one dollar verdict for the unlawful entry will not vindicate the Mendezes' Fourth Amendment rights or incentivize police officers to respect the rule that "draw[s] a 'firm line at the entrance to the house.'" *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)).

II. PEOPLE OF COLOR ARE DISPROPORTIONATELY KILLED BY POLICE, AND THEY WILL DISPROPORTIONATELY BEAR THE BURDEN OF ANY DECISION THAT MAKES UNANNOUNCED HOME ENTRIES—AND THE ATTENDANT SPLIT-SECOND, LIFE-OR-DEATH JUDGMENTS—BY POLICE MORE LIKELY TO OCCUR.

People of color will be among those to most acutely feel the effect of any decision that retreats from a totality of the circumstances analysis, particularly in the context of facts like these. This is in part because the sudden, split-second judgements occasioned by the type of entry that was made in this case provide fertile ground for the pernicious influence of implicit bias. *See United States v. Mateo-Medina*, No. 14-2862, 2017 U.S. App. LEXIS 342, at *12–13 (3d Cir. Jan. 9, 2017) (discussing operation of implicit bias "in situations that require rapid decision-making"). The science of implicit racial bias indicates that unconscious mental processes of perception, impression, and judgment are influenced by powerful cultural stereotypes that can function to produce behavior at odds with an individual's avowed principles. *See generally* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006) (surveying implicit bias research). "[A] substantial and actively accumulating body of research evidence establishes that implicit race bias is pervasive and is associated with discrimination against African Americans." *Id.* at 966.

As Justice Sotomayor recently observed, "it is no secret that people of color are disproportionate

victims" of "the humiliations of . . . unconstitutional searches." *Utah v. Strieff*, __ U.S. __, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (citing M. ALEXANDER, THE NEW JIM CROW 95–136 (2010)). Implicit bias appears to play a significant role in explaining these disparities. Jane Bambauer, *Hassle*, 113 MICH. L. REV. 461, 499 (2015); Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 906–09 (2014); Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 382 (2007). In fact, research suggests the phenomenon impacts a range of police activities. *See United States v. Mateo-Medina*, No. 14-2862, 2017 U.S. App. LEXIS 342, at *11–13 (3d Cir. Jan. 9, 2017) (citing "recent research indicating that police are more likely to stop, and arrest, people of color due to implicit bias"). Understanding the stakes, the U.S. Department of Justice recently announced that "it will train all of its law enforcement agents and prosecutors to recognize and address implicit bias as part of its regular training curricula." U.S. DEP'T OF JUSTICE, OFFICE OF PUB. AFF., *Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel* (June 27, 2016), https://www.justice.gov/opa/pr/department-justice-announces-new-department-wide-implicit-bias-training-personnel.

However, implicit bias poses its greatest danger when "police officers [are] . . . forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly-evolving—about the [use] of force." *Graham v. Connor*, 490 U.S. 386, 397 (1989). "Extensive research has shown that in such situations the vast majority of Americans of all races

implicitly associate black Americans with adjectives such as 'dangerous,' 'aggressive,' 'violent,' and 'criminal.' " THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE U.N. HUMAN RIGHTS CMTE. REGARDING RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 4 (Aug. 2013); *see generally*, Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159 (2016) (exploring how social cognitions, including implicitly held associations, lead to police violence against African-Americans).

Implicit bias helps account for "evidence of a significant bias in the killing of unarmed black Americans relative to unarmed white Americans" by police officers in the United States. *See* Cody T. Ross, *A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States, 2011–2014*, PLOS ONE (Nov. 2015), http://dx.doi.org/10.1371/journal.pone.0141854. According one analysis, "the probability of being black, unarmed, and shot by police is about 3.49 times the probability of being white, unarmed, and shot by police on average." *Id.*; *see also* J. Nix et al., *A Bird's Eye View of Civilians Killed by Police in 2015*, 16 CRIMINOLOGY J. PUB. POL. 1, 1 (2017) (conducting multivariate regression analysis of 990 fatal police shootings in 2015 and concluding "Black civilians [shot by police] were more than twice as likely as White civilians to have been unarmed"). Other analyses lend support to the conclusion that people of color are more likely to be perceived as deadly threats by officers faced with making "split-second" judgments, such as occurred in this case.

See, e.g., Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1325 (2002) (finding that when a "target was unarmed, participants mistakenly shot him more often when he was African American than when he was White"); Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 J. PERSONALITY & SOC. PSYCHOL. 1139, 1146 (1995) (identifying "aggressiveness" as a trait frequently associated with Blacks and concluding "that there is a clear, consistent contemporary stereotype of Blacks . . . that . . . is highly negative in nature"). In simulated shooting experiments, officers have "exhibited robust racial bias in response speed" when confronted with "decisions to shoot (or not shoot) Black and White targets." Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1006 (2007).

In the real world, these biases have deadly consequences. Justice Sotomayor reflected on the mortal danger they pose in her dissent in *Strieff*, writing that, "[f]or generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of a fear of how an officer with a gun will react to them." *Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting) (citations omitted). Elsewhere, this Court has recognized that the "problem of disparate

treatment is real" and has been "validated by law enforcement investigations into their own practices." *Illinois v. Wardlow*, 528 U.S. 119, 133 & n.10 (2000) (quotation omitted). In fact, numerous courts have recognized that people of color in this country face "the recurring indignity of being racially profiled." *Massachusetts v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016); *Ligon v. City of N.Y.*, 925 F. Supp. 2d 478, 496 (S.D.N.Y. 2013) (finding that young black men face routine and pervasive "indignities," including illegal and invasive searches, at the hands of the NYPD). The absence of a Fourth Amendment remedy for intentionally discriminatory treatment has "enable[d] artifice and abuse by law enforcement, with [a] disproportionate effect on racial minorities." *United States v. Magallon-Lopez*, 817 F.3d 671, 677 (9th Cir. 2016) (Berzon, J., concurring); *cf. Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting) ("[A]s the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual.").

"Racial profiling is generally understood to mean the improper use of race as a basis for taking law enforcement action." *Chavez v. Ill. State Police*, 251 F.3d 612, 620 (7th Cir. 2001); *see also* Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 168 n.24 (surveying legal definitions). Some departments, however, walk a fine line and instruct their officers that so long as they are not treating someone differently "*solely* because of [their] race," they are not engaged in racial profiling. *Melendres v. Arpaio*, 989 F. Supp. 2d

822, 849 (D. Ariz. 2013) (emphasis added). These distinctions matter, and people's lives depend on them. Permitting officers to account for an individual's race or zip code when deciding what weapons to use, whether to knock-and-announce, or whether to provide an opportunity to surrender before overwhelming with force, leaves people of color and the poor acutely vulnerable. Even departments that strictly guard against profiling must work hard not to let implicit bias impact their objective assessment of a person's likely dangerousness.

Indeed, patterns of SWAT team deployment—a rough proxy for officers' estimation of a subject's dangerousness—are suggestive of implicit and institutional bias. Racial minorities make up the majority of those subjected to forceful home entries made pursuant to warrants by SWAT teams, with the majority (60%) of such entries made in the course of drug investigations. *See* American Civil Liberties Union, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 3, 36 (2014). Meanwhile, just 22% of persons impacted by deployments that targeted an active shooter, hostage-taker, or barricade situation were minorities. *Id.* at 36. Not only do these home entries disproportionately impact blacks and Latinos, but the equipment and training officers receive in many cases "encourages them to adopt a 'warrior' mentality and think of the people they are supposed to serve as enemies." *Id.* at 3; RADLEY BALKO, *Overkill: The Rise of Police Paramilitary Raids in America*, CATO INST. 17 (2006) ("Twenty-five years of an infusion of military hardware, training, and

tactics has . . . trained police officers—particularly SWAT officers and drug police—to adopt the win-at-all-costs mentality of a soldier."); *see generally* RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES (2014) (an in-depth exploration of a "creeping battlefield mentality that has isolated and alienated American police officers"). This mentality often inspires unannounced and poorly considered entries into the homes of innocent Americans, with tragic results. *See, e.g.*, Tina Chen, *Baby in Coma After Police Grenade Dropped in Crib During Drug Raid*, ABC NEWS (May 30, 2014), http://abcnews.go.com/blogs/headlines/2014/05/baby-in-coma-after-police-grenade-dropped-in-crib-during-drug-raid/ (describing no-knock raid that uncovered no drugs but grievously injured an infant).

The instant case, of course, did not involve a SWAT entry. But the decision here stands to have significant ramifications for any police officer engaged in an unannounced forcible home entry. The Court has previously held that "the Fourth Amendment draws a 'firm line at the entrance to the house.' That line, we think, must be not only firm, but also bright . . . ." *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (quoting *Payton v. New York*, 445 U.S. 573, 589–90 (1980)); *see also Silverman v. United States*, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."). This case represents an opportunity to either reaffirm or to back away from that firm, bright line.

It is critical for the safety of people of color in this country that this Court acknowledge and account for the emerging literature on implicit bias when crafting rules affecting the lawful use of force. *See Pippen v. Iowa*, 854 N.W.2d 1, 33 n.9 (Iowa 2014) ("Implicit-bias research and its application to legal theories has been thoroughly reviewed in legal scholarship."). Because people of color are more likely to be targeted by forced home entries, and because implicit bias is at its most acute "in situations that require rapid decision-making," where officers are most likely to "implicitly associate black Americans with . . . dangerous[ness], aggressive[ness], violen[ce], and criminal[ity]," *Mateo-Medina*, 2017 U.S. App. LEXIS 342, at *12–13 (quotations omitted), it will be they, as well as Latinos like the Mendezes, who will disproportionately bear the burden of officers' mistaken judgments to use deadly force. *Cf. Villegas v. Metro. Gov't*, No. 3:09-0219 U.S. Dist. LEXIS 135110, at *23–24 (M.D. Tenn. Sep. 20, 2012) (noting Vanderbilt study demonstrating "that most Americans, despite their best intentions, harbor a negative bias against Latino immigrants" that "influence [their] judgments and behavior").

III. PEOPLE WITH MENTAL ILLNESS ARE MORE LIKELY TO HAVE DIFFICULTY COMPREHENDING AN UNANNOUNCED HOME ENTRY BY POLICE, MORE LIKELY TO RESPOND IN WAYS POLICE DEEM THREATENING, AND WILL DISPROPORTIONATELY BEAR THE BURDEN OF ANY DECISION THAT MAKES SUCH ENTRIES MORE LIKELY.

It is important to the safety of people with mental illness that the constitutional framework for excessive force claims not retreat from a totality of the circumstances approach. If the focus is solely on the *moment* force is used, with no regard for the preceding circumstances, force used against such individuals will almost never be deemed unreasonable. A large number of police interactions with people with mental illness do not involve any allegation of criminal wrongdoing but rather occur in response to calls for assistance stemming from some mental crisis. Although this alone does not forbid officers from using force if the need arises, it is a factor that weighs against it.

People suffering from mental illness will be acutely vulnerable to the impact of any decision that extends the principle of immunity for the proximate consequences of unannounced, forcible entries into a home. They are likely to have more difficulty comprehending an unannounced entry, and many are likely to react in ways that will prompt officers to feel the need to employ deadly force. *Cf. Allen v. Muskogee*, 119 F.3d 837, 844 (10th Cir. 1997) (reversing grant of summary judgment in favor of City, citing evidence that "approaching and trying to

grab a gun from an emotionally disturbed . . . person created a high risk of death for officers, the armed person, and other civilians, and was reckless"). Police officers are more likely to have difficulty assessing a person's dangerousness if they are mentally ill. *Cf. Heller v. Doe*, 509 U.S. 312, 323–24 (1993) ("Prediction of future behavior is complicated . . . by the difficulties inherent in diagnosis of mental illness."). Moreover, an officer's show of force to a mentally disturbed individual will not always have the intended effect and in many cases can "exacerbate the situation." *Deorle v. Rutherford*, 272 F.3d 1272, 1282 (9th Cir. 2001); *Sheehan v. City & Cnty. of S.F.*, 743 F.3d 1211, 1227 (9th Cir. 2014), *rev'd in part*, __ U.S. __, 135 S. Ct. 1765, 1778 (2015).

People with mental illness behave in ways that are predictably unpredictable. *Cf. Ake v. Oklahoma*, 470 U.S. 68, 81 (1985) ("Psychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on . . . likelihood of future dangerousness."). Research indicates that the general public strongly associates people with mental illness with violence and danger. Jo C. Phelan & Bruce G. Link, *Fear of People with Mental Illness*, 45 J. HEALTH & SOC. BEHAV. 68, 76 (Mar. 2004). Those in law enforcement are no exception; "officers tend to perceive [them] as particularly dangerous, and . . . calls involving persons with mental illnesses may be more likely to result in injuries to officers or the person with mental illness." Amy C. Watson, PhD. et al., *Understanding How Police Officers Think About Mental/Emotional Disturbance Calls*, 37 INT'L J. L. PSYCHIATRY 351 (2014) (citing J. Ruiz, *An Interactive Analysis*

Between Uniformed Law Enforcement Officers and the Mentally Ill, 12 AM. J. OF POLICE 149 (1993); G. Cordner, *People with Mental Illness*, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES (2006)). A heightened expectation of danger can cause officers "to approach in a manner that contributes to the escalation of violence in the encounter and the need to respond with physical force." Watson, *supra* at 351. (citing Ruiz, 1993). In addition, "police officers may be more likely to view common objects, such as a chair, as a potential weapon," when those objects are in the vicinity or possession of a person with mental illness. Watson, *supra* at 351.

In the kind of "split-second" encounters as occurred in this case, however, where police make a sudden, unannounced entry into a home with weapons drawn and confront an alarmed homeowner, who might lack the cognitive ability to immediately comprehend the reality of the situation, an individual's mental illness may not be apparent to the officer prior to the moment they deem it necessary to employ deadly force. Officers often reasonably misinterpret the behavior, demeanor, and intentions of people with mental illness or disability. Such persons "can appear to be ignoring an officer when really they might not understand the officer's instructions." *Id.* (citing Cordner, 2006). Certain symptoms "can exacerbate a hostile demeanor or the appearance of resistance[.]" *Id.* (citing J. MacDonald, et al., *Police Use of Force: Examining the Relationship Between Calls for Service and the Balance of Police Force and Suspect Resistance*, 31 J. CRIM. JUSTICE 119, 119–27 (2003)). At the same time, those with mental illness are more

likely to resist arrest, and consequently, more likely to experience higher levels of police force. *See id.* (citing R.R. Johnson, *Suspect Mental Disorder and Police Use of Force*, 38 CRIM. JUSTICE AND BEHAV. 127, 127–45 (2011)).

Each of these factors helps account for the fact that a significant number of those killed by police officers in the United States die while in the midst of a mental health crisis. *The Washington Post* recently undertook to create a "national, real-time tally of the shooting deaths of mentally distraught individuals at the hands of law enforcement." *See generally* Wesley Lowery et al., *Distraught People, Deadly Results*, WASH. POST (June 30, 2015), http://www.washingtonpost.com/sf/investigative/2015/06/30/distraught-people-deadly-results/. Their analysis found that "the dead account[ed] for a quarter of the 462 people shot to death by police in the first six months of 2015." *Id.* A survey of police-involved deaths in New York City in 1999 determined that one third of those killed were mentally ill. *See* James J. Frye, *Policing the Emotionally Disturbed*, 28 J. AM. ACAD. PSYCHIATRY 345 (2000). A twenty year survey in Seattle from 1980 and 2000 reached the same conclusion. *See* Robert L. Jamieson, Jr. & Kimberly A.C. Wilson, *Mental Illness Frequently Deepens Tragedy of Police Shootings*, SEATTLE POST-INTELLIGENCER, May 25, 2000.

However, the disproportionate use of force against persons with mental illness is not always a result of officer misapprehension or aggressiveness on the part of the mentally ill. As this Court has

recognized, "the symptomatology of a mental or emotional illness" can be "truly 'stigmatizing,' " and "arouse[] . . . negative reaction" and "social ostracism." *Parham v. J.R.*, 442 U.S. 584, 601 (1979) (quoting *Addington v. Texas*, 441 U.S. 418, 429 (1979)); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445–46 (1985) (noting that "the mentally ill" experience "prejudice from at least part of the public at large"). There is evidence that these intensely negative perceptions—embodied by the "stereotype of the violent psychotic person"—have become appreciably worse in the age of mass media. *See* Jo C. Phelan et al., *Public Conceptions of Mental Illness in 1950 and 1996*, 41 J. HEALTH & SOC. BEHAV. 188, 202 (2000). Police officers are not immune from such reactions. In a recent example, an investigation by the U.S. Department of Justice discovered that the Baltimore Police Department "routinely uses unreasonable force against people with mental illness or in crisis, even when they have not committed any crimes and when the officers know or should know that the individual has a mental health disability." U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALT. CTY. POLICE DEP'T 80 (Aug. 10, 2016), https://www.justice.gov/opa/file/883366/download.

All of the aforementioned factors can create a dangerous dynamic when police officers encounter persons with mental illness. This is doubly so in close quarters when officers make a surprise entry into a person's home, as occurred in this case. It is critical to the safety of persons with mental illness that officers be held liable for injuries that flow from their failure to announce their presence before

making a forcible home entry. If they are not, they will have little incentive to comply with the expectation of announcement. While the element of surprise may offer some comfort to a police officer, it adds an unnecessary element of danger to the home occupant. *See Hudson v. Michigan*, 547 U.S. 586, 593–96 (2006) (discussing reasons for the announcement rule).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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